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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 81

G. SHALS AIKEN,

Appellant,

vs.

WILLIAM RICHARDSON

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF GEORGIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

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No. 81

G. SEALS AIKEN,

Appellant,

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Appellee.

APPEAL FROM COURT OF APPEALS OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 (1) of the Rules of the Supreme Court of the United States, Appellant files a Statement as to Jurisdiction, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decision and judgments in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code (U.S. C. Title 28, Sec. 344) reading as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

> be had . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ of error shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of said State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

and under U. S. C. A. Title 28, Section 1257, providing in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be had as a matter of right on writ of error.

Georgia Statutes Questioned

In this case the validity of certain statutes of the State of Georgia, as construed and applied by the Court of Appeals of Georgia to the pleadings in this case and the acts and activities of Appellant as set forth hereafter in this Statement, are drawn in question on the ground of their

being repugnant to the Constitution of the United States, and the decision and judgment of the Court of Appeals of Georgia are in favor of the validity of said statutes. The statutes drawn in question are as follows:

> 1933 Georgia Code Section "9-617 (4954) LIABILITY OF ATTORNEYS TO BE RULED.—Where attorneys retain in their hands the money of their clients after it has been demanded, they are liable to rule (and otherwise) as sheriffs are, and incur the same penalties and consequences. (Act 1822, Cobb, 578)."
>
> 1933 Georgia Code Section "24-210 (5347). ANSWER TO RULE NISI, AND SUBSEQUENT PROCEEDINGS.—The officer called on by rule nisi, as provided in the preceding section, shall fully respond in writing to said rule, which answer shall be under oath taken at the time the answer is filed; and if the answer is not denied, the rule shall be discharged, or made absolute, according as the court may deem the answer sufficient or not. The movant of the rule may traverse the truth of such answer, in which case an issue shall be made up and tried by a jury at the same term, unless good cause of continuance be shown, which may be done once only by either party. Upon the trial of such issue the court shall discharge the rule, or make the same absolute, according as the verdict of the jury may be for or against the officer. (Act. 1840, Cobb, 579.)."

Timeliness

The Court of Appeals of Georgia rendered and entered its decision and judgment in this case on December 4, 1951 (Appendix "A", R. 117-130). On December 11th, 1951, Appellant duly and properly filed his motion for rehearing with the Court of Appeals of Georgia (R. 131). On December 17, 1951, said court denied said motion after modifying its decision and judgment by inserting the clause, "as finally amended," in the next to the last sentence of Paragraph 4 of the body of its decision, between the words

"answer" and "he." (Appendix "A", R. 127). Appellant then filed his petition for certiorari with the Supreme Court of Georgia within the time prescribed by law. Said petition for certiorari was denied February 14, 1952. Appellant filed within the time provided his motion for reconsideration of the denial of said petition for certiorari. This motion was denied March 26, 1952. The decision and judgment of the Court of Appeals of Georgia as modified on December 17, 1951, then became final. The petition for appeal and other papers required by the rules of this court are filed within ninety days from the date said decision and judgment of the Court of Appeals of Georgia became final, and this appeal is therefore timely made.

Opinions

The opinion of the Court of Appeals of Georgia of December 4, 1951, as modified on December 17, 1951, is attached hereto as Appendix A to this Statement. It also appears in the Record at Pages 117-130.

Statement of the Nature of the Case and Rulings of Court Bringing Case Within Jurisdictional Provisions Relied Upon.

On May 28, 1949, Fulton Superior Court of Georgia issued a PENAL rule nisi against Appellant, a member of the Bar of Georgia since June 2, 1920, ordering him to show cause why he should not be required to pay over to Appellee the sum of $2,283.33, and why, after a hearing, a rule absolute should not be issued against Appellant commanding him to make immediate payment of said sum or in default thereof that he be adjudged in contempt of court and be disbarred (R. 53-4). This penal Rule was based upon a motion of Appellee charging Appellant with a number of crimes, including the solicitation of the legal business of

Appellee, forging the name of Appellee on a draft, wrongfully withholding from Appellee the sum of $2,283.33 allegedly due him out of a collection, false representations, false swearing, etc. (R. 44, 55, 61, 65.)

The Appellee filed three amendments to his said motion for penal rule.

Appellant duly filed his sworn answer (R. 69, 82, 101), setting up his contract of professional employment, denying in toto the charges made, and showing he had paid Appellee the amount due him under the contract ($1,591.33). The said answer was filed subject to Appellant's general and special demurrers.

Thereafter Appellee filed a traverse (R. 90) of Appellant's answer raising many issues of fact, which under the law and Constitution of Georgia, must be determined by a jury upon submission of evidence.

On June 21, 1949, Appellee filed a motion to strike (R. 113) Appellant's original answer (R. 69). On October 23, 1950, the Superior Court sustained the special grounds 2, 3, 4, and 5 of said motion and overruled the general grounds 1 and 6. In overruling grounds 1 and 6 the court specifically held that the Appellant's answer set forth an issuable defense and showed reason why a rule absolute should not issue. The said order further provided that "The respondent is hereby allowed ten days to amend his answer."

Appellant did not file an amendment under said order because he had filed an answer denying the charges and setting up the contract and alleging he had paid Appellee the amount due him thereunder, and the Superior Court had ruled as aforesaid that his answer set forth an issuable defense and showed reason why a rule absolute should not issue, and this ruling had not been vacated or set aside and thereby fixed the law of the case in said respect.

On November 3, 1950, Appellee filed another motion to strike Appellant's answer upon the ground that no amend-

ment had been filed by Appellant within ten days as "allowed" by the order of October 23, 1950, and prayed for a rule absolute.

On November 17, 1950, the Superior Court struck Appellant's answer and on November 20, 1950, entered a rule absolute against him for $2,189.38 and 20 per cent penalty per annum thereon from May 23, 1949, until paid, and all costs. The said rule absolute was entered without a trial of the issues of fact, without any evidence whatever in support of said order, and without the right to Appellant to present any evidence whatever in his own behalf.

How Federal Questions Sought to be Reviewed Were Raised and the Way in Which They Were Passed Upon by the Court.

I

The federal question presented in the first assignment of error in the present appeal was raised in the Superior Court at the time the rule absolute was entered, by oral exception and assignment of error thereon before said court. It was then preserved and insisted upon by incorporating it in the Bill of Exceptions (R. 10-11) to the Court of Appeals of Georgia and duly certified as true by the Presiding Judge of the Superior Court. The substance of said exception and assignment was that the Georgia Statute identified as Georgia Code Section 24-210, providing as follows:

> "ANSWER TO RULE NISI, AND SUBSEQUENT PROCEEDINGS.—The officer called on by rule nisi, as provided in the preceding section, shall fully respond in writing to said rule, which answer shall be under oath taken at the time the answer is filed; and if the answer is not denied, the rule shall be discharged, or made absolute, according as the court may deem the answer sufficient or not. The movant of the rule may traverse the truth

> of such answer, in which case an issue shall be made up and tried by a jury at the same term, unless good cause of continuance be shown, which may be done once only by either party. Upon the trial of such issue the court shall discharge the rule, or make the same absolute, according as the verdict of the jury may be for or against the officer. (Act 1840, Cobb, 579)."

was construed by the Superior Court to mean that the said rule absolute could be issued against Aiken as respondent in said penal proceeding in disregard of Aiken's answer to Richardson's original motion for rule and to Richardson's first amendment, and Aiken's amendment to his answer; each of Aiken's said pleadings setting forth his defense to Richardson's motion as amended and showing Aiken had paid Richardson all the money due him under the contract ($1,591.33); and even though Richardson had traversed Aiken's answer; the said statute being thus construed to mean that the questions of fact raised by Richardson's traverse could not be submitted to the jury or even considered by the court. Appellant thus contended that the said statute, as thus construed and given effect, adjudged him guilty or presumptively guilty of the unproven crimes charged against him, without a jury trial under the laws of the State of Georgia, without an opportunity to defend himself against said charges, and without any proof whatever on the part of Richardson, either on his motion for penal rule or in his traverse of the facts set forth in his answer. Appellant further contended that said statute, as thus construed and applied, creates a presumption that is arbitrary and operates to deny Appellant a fair opportunity to repel it and so violates the due process clause of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

Appellant also urged said federal question in his oral and written briefs and arguments before the Court of Appeals and in his Motion for Rehearing (R. 142-4) in that court. In Paragraph 21 of his motion for rehearing, Appellant stated in part as follows:

> The Court of Appeals holds the very language of Code Section 24-210 authorizes the court to examine the answer and determine if the respondent has fully responded and in its discretion to strike the answer and enter a rule absolute without evidence or trial, even though it has found that the answer presents issues of fact and reasons why the rule should not be made absolute; that the Superior Court accordingly did not err in its order of November 17, 1950, striking respondent's answer and in thereafter entering a rule absolute against him. Aiken contends the said Code Section as thus construed and applied in this case adjudges him guilty or presumptively guilty of the unproven crimes charged against him, without a jury trial, without any opportunity to defend himself or to avail himself of his answer or amendment or of his denial of guilt of said crimes, and without any proof on the part of Richardson, either on his motion for rule or on his traverse of Aiken's answer; that the said statute as thus construed and applied creates a presumption that is arbitrary and that operates to deny a fair opportunity to repel it and violates the due process clause of the Fourteenth Amendment of the U. S. Constitution, citing *Manley* v. *State of Georgia,* 279 U. S. 1.

Prior to granting the rule absolute, the Superior Court struck Appellant's sworn answer to the penal rule. In his exceptions pendente lite to the order of said court of November 17, 1950, striking his answer, Appellant excepted and assigned error thereon upon the ground that the Georgia statute identified as Georgia Code Section 24-210 as construed and applied to the pleadings in this case and the acts of Appellant adjudged him guilty or presumptively

guilty of the crimes charged against him, without a jury trial, without any opportunity to defend himself or to avail himself of his answer, without any proof in support of said penal rule or the traverse of his answer, and that the said statute therefore created a presumption that is arbitrary and operates to deny a fair opportunity to repel it and violates the due process clause of the Fourteenth Amen - ment (R. 40-41). Appellant excepted and assigned error in his Bill of Exceptions (R. 13-14) to the Court of Appeals of Georgia upon said exceptions pendente lite. He urged this assignment of error in his oral and written arguments and Motion for Rehearing in the Court of Appeals and in his Petition for Certiorari and Motion for Reconsideration of Denial of Certiorari in the Supreme Court of Georgia.

The federal question thus presented is similar to the one involved in *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, holding in the headnotes as follows:

> "1. . . . it is a denial of due process of law to strike out an answer, and render a decree pro confesso as a punishment for contempt."
>
> "2. A judgment pro confesso against a defendant whose answer has been stricken out under the assumed power to thus punish for contempt is void for want of jurisdiction, and may be collaterally attacked."

The jurisdiction of the Supreme Court in this case is supported by *Manley* v. *State of Georgia*, 279 U. S. 1, holding that a statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment and that it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.

The case of *Manley* v. *State of Georgia, supra,* was cited and followed by this court in *Western & A. R. R.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445.

Jurisdiction of this court in this case is supported by the 1948 decision of this court *In re: Oliver,* 333 U. S. 257, 68 S. Ct. 499, reversing the Supreme Court of Michigan in upholding a summary conviction of Oliver for contempt without affording him an opportunity to defend himself.

Norris v. *State of Alabama,* 295 U. S. 587.

II

The federal question presented in the second assignment of error was raised in Fulton Superior Court of Georgia at the time the rule absolute was entered, by oral exception and assignment of error thereon before said court. It was then preserved and insisted upon by incorporating it in the Bill of Exceptions (R. 9-10) to the Court of Appeals of Georgia, and duly certified as true by the Presiding Judge of the Superior Court. The substance of said exception and assignment was that the Georgia statute identified as Georgia Code Section 9-617, providing as follows:

> "Liability of Attorneys to be Ruled.—Where attorneys retain in their hands the money of their clients after it has been demanded, they are liable to rule (and otherwise) as sheriffs are, and incur the same penalties and consequences. (Act 1822, Cobb, 578)."

was construed by said Superior Court to mean the said rule absolute could be issued against Appellant in said penal proceeding where his answer showed he had not retained in his hands any money of his client, Appellee, but had paid him the amount due him under the contract ($1,591.33) between them as set up in his answer, and his answer could be stricken after it had been traversed by

Appellee, and Appellant was thereby deprived of the opportunity to defend himself against the criminal charges made against him. Appellant contended that the said statute as thus construed and applied by the Court of Appeals to the pleadings in this case and to the acts and activities of Appellant deprived him of the due process of law guaranteed to him by Section I of the Fourteenth Amendment of the U. S. Constitution. He urged said federal question in his oral and written briefs and arguments and Motion for Rehearing (R. 144-5) before the Court of Appeals of Georgia, contending also that said statute created a presumption that operates to deny a fair opportunity to repel it and declares him guilty or presumptively guilty of the crimes charged against him, all without any proof in support of said rule, without any opportunity to appellant to present any evidence in his own defense, and without trial. He also urged the same ground in his petition to the Supreme Court of Georgia for certiorari and in his motion in that court for reconsideration of the denial of certiorari. The jurisdiction of the Supreme Court under this federal question is supported by:

Hovey v. *Elliott*, 167 U. S. 409;
Manley v. *State of Georgia*, 279 U. S. 1;
Norris v. *State of Alabama*, 295 U. S. 587;
Lovell v. *City of Griffin*, 303 U. S. 444.

The federal question presented under this assignment of error is similar to the one involved in *Hovey* v. *Elliott*, *supra*. holding it is a denial of due process to strike out an answer in a penal or contempt proceeding and render a decree *pro confesso*. In that case Mr. Justice White said:

> "It is difficult to speak of a decree thus rendered with moderation. It was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

III

The federal question presented in the third assignment of error was raised in Fulton Superior Court of Georgia in Bill of Exceptions (R. 7, 8, 9) to the Court of Appeals of Georgia, which was duly certified as true by the Presiding Judge of the Superior Court. Appellant stated in said exception in substance that the said rule absolute granted by the Superior Court had the effect of depriving him of his liberty and property without due process of law and without equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the U. S. Constitution and the provisions of the Georgia Constitution cited and in the particulars specified in said Bill of Exceptions and as presented in substance in the third assignment of error.

Appellant also urged said federal question in his oral and written briefs and arguments and Motion for Rehearing before the Court of Appeals (R. 131, 152). He urged it in his Petition to the Supreme Court of Georgia for Certiorari and in his Motion for Reconsideration of Denial of Certiorari.

The jurisdiction of the Supreme Court on this ground is supported by:

Hovey v. *Elliott*, 167 U. S. 409;
In re: Oliver, 333 U. S. 257;
Manley v. *State of Georgia*, 279 U. S. 1;
Western & Atlantic R. R. v. *Henderson*, 279 U. S. 639;
Texas v. *White*, 10 Wall. 483;
Norris v. *State of Alabama*, 295 U. S. 587;
Lovell v. *City of Griffin*, 303 U. S. 44.

Grounds Upon Which It Is Contended the Federal Questions Involved Are Substantial

Appellant contends the federal questions involved in this appeal are substantial in that they show he was deprived

of the same fundamental federal constitutional rights as those presented in the cases of *Hovey* v. *Elliott*, 167 U. S. 409, and *In re: Oliver*, 333 U. S. 257. The said grounds are set forth more fully elsewhere in this Statement and in the assignments of error in the appeal.

Conclusion

In the interest of brevity, Appellant incorporates by reference in this Statement as to Jurisdiction his Appeal, Statement, Assignments of Error, and Prayer for Reversal.

It is submitted that the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of this court for the reasons set forth above.

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APPENDIX A

Dec. 4, 1951.
M-48.

No. 33567

AIKEN *v.* RICHARDSON and vice versa

No. 33568

1. The judgment of the trial court sustaining certain grounds of a motion to dismiss the answer of the respondent having been sustained and being unexcepted to became the law of the case that the answer was subject to be dismissed for the reasons set forth in said motion. It follows that the subsequent judgment of the trial court dismissing the answer was without error. Since under the law of this State governing money rules it is the duty of the trial court in the absence of an answer of the respondent to make the rule absolute, and since after dismissal there was no answer in this proceeding, the trial court accordingly did not err in entering the judgment making the rule absolute here.

2. There is nothing in the record to show that the trial judge entering the final judgment in this case was without jurisdiction and since judges of the superior courts have jurisdiction of money rules this assignment of error is without merit.

3. Error, to be reversible, must be shown to be harmful. Without deciding whether or not it was error for the trial court to overrule the motion for a continuance in this case, this assignment of error is without merit because the record does not disclose any harm suffered by the respondent by reason thereof.

4. Since the answer of the respondent was properly stricken the judgment making the rule absolute was demanded. Therefore the overruling of respondent's special demurrers to the original motion for the money rule, if error, was harmless.

5. The introduction in evidence of the affidavit and the demand of movant is in accordance with Code Section 24-207 and was therefore not improper.

6. The assignments of error on various rulings of the trial court on the traverse of the movant to the answer of the respondent are nugatory. The answer having been properly stricken, there was nothing at the time of the entry of the final judgment to be traversed. It follows that these assignments of error are without merit.

The defendant in error, hereinafter referred to as the movant, filed a motion in the Superior Court of Fulton County against the Plaintiff in Error, hereinafter referred to as the respondent, for a money rule under Chapter 24-2 of the Code of Georgia. For a more detailed statement of the case see Aiken vs. Richardson, 80 Ga. App. 591 et seq. wherein it is held that the application for the rule is not subject to general demurrer.

The respondent interposed certain special demurrers to the application for the money rule of the movant which were overruled on June 20, 1950. To this order respondent preserved exceptions pendente lite and assigns error thereon in his bill of exceptions. In the meantime, respondent had filed an answer as contemplated by Code Section 24-210. Thereafter, on June 21, 1949, movant moved to strike respondent's answer, which motion, in toto, is as follows:

"Comes now William Richardson and moves that respondent's answer be stricken and that a rule absolute issue for the following reasons: (1) Said answer sets forth no issuable defense. (2) Defendant has made no accounting, although he admits receipt of $3,425.00 paid to him in settlement of movant's claim. (3) Said answer is vague, indefinite, uncertain, evasive, and self-contradictory. (4) Said answer does not itemize the expenses averred to have been advanced by respondent in paragraphs 19 and 20 nor show when, to whom or for what such payments were made. (5) Said answer does not set forth any vouchers in support of expenses averred to have been advanced by respondent in paragraphs 19 and 20 as required by law. (6) Said answer shows no reason why said rule should not be made absolute.

Wherefore, Movant prays that respondent's answer be stricken and that a rule absolute be issued against respondent."

This motion continued to pend until renewed by another motion on October 5, 1950, as follows:

"Comes now William Richardson and renews his motion to strike respondent's answer as heretofore filed and moves that the respondent's answer as heretofore amended be stricken and that a rule absolute be issued against respondent."

Pursuant to these motions the trial court on October 23, 1950, entered an order thereon as follows:

"William Richardson's motion to strike respondent's answer in the above stated case coming on for a hearing and after hearing argument it is ordered that the grounds set forth in paragraphs 2, 3, 4 and 5 of said motion be and the same are hereby sustained. The grounds set forth in paragraph 1 and 6 of said motion are hereby overruled. The respondent is hereby allowed ten days within which to amend his answer."

The answer of respondent was not amended in accordance with this order, but respondent preserved exceptions pendente lite thereon. However, no exceptions appear to this order in the bill of exceptions. On November 3, 1950, respondent having failed to amend his petition within ten days from the date of the order sustaining certain grounds of the motion to strike respondent's answer as hereinbefore set forth, movant filed a motion to strike the answer of respondent as follows:

"Comes now William Richardson, plaintiff in the above styled case, and respectfully shows: (1) That a motion to strike the answer of the defendant was filed and renewed to the defendant's answer as amended, and, after arguement, said motion to strike was sustained upon grounds 2, 3, 4, and 5 thereof, by order of this court entered on October 23, 1950, and the defendant was given the right to amend within a period of ten days from the date of said order. (2) The time allowed for the defendant to amend under the terms of said order has now expired, and no amendment has been filed or tendered by said defendant. Wherefore, Plaintiff moves the court that an order be entered striking and dismissing the response of said defendant, and that a rule absolute be entered against said defendant upon plaintiff's original motion for money rule as heretofore

amended." This motion was set for hearing on November 8, and, having come on for a hearing on that date, respondent moved to continue on grounds as follows: that his leading counsel and associate counsel were, upon his information and belief, prevented from being present because of other important court engagements made before notice of the hearing in this case; that he could not safely go to trial without them, and expected their services at the next term of court. The continuance on these grounds was requested for a thirty day period, and the court granted a continuance for a nine day period, or until November 17. Exceptions pendente lite were duly preserved to this order, and error is assigned thereon. The respondent further urged in the form of an oral motion his oral contention that the judge presiding over this hearing, Judge Andrews, did not have jurisdiction of said case "for the reason that he was the Presiding Judge of the Second Civil Division of Fulton Superior Court for the November Term, 1950, and under the rules of said Court and its regularly published order of business for said term, the judge presiding in the non-jury division of said court for said term had jurisdiction to entertain said motion." This contention was also overruled, exceptions pendente lite preserved thereto, and error assigned thereon. Error is assigned on exceptions pendente lite in the bill of exceptions upon the admission in evidence against the respondent of an affidavit regarding the service of a letter of demand upon him previous to the application for money rule, at the hearing on November 17, together with a copy of the letter referred to therein, on the grounds that the original letter was not accounted for; that the demand is excessive, and that there is no prayer for the 20% interest referred to therein in the original application for the money rule. Error is also assigned in the bill of exceptions upon an order of this court dated November 17, 1950, striking respondent's answer as amended and an order of the same date making the rule absolute, which order is as follows: "The response of G. Seals Aiken as amended to the motion of William Richardson for a money rule against him having been stricken, It is ordered, adjudged and decreed that said motion for a money rule be, and the same is hereby, made absolute and

the said G. Seals Aiken is hereby required and ordered to pay over to the said William Richardson or his Attorneys of record the sum of $2,189.38, together with 20% per annum upon same sum from May 23, 1949, until paid, together with the sum of $—— costs."

MacIntyre, *P.J.* (After stating the foregoing facts.)

Proceedings on money rules are controlled by chapter 24-2 of the Code of Georgia, providing that a judge of the superior court, upon application, may grant a rule nisi containing a full statement of the case in which the officer is called upon to show cause; that, in answer to this rule, the officer ruled shall fully respond in writing and under oath; that thereafter the movant of the rule may traverse the truth of such answer and, when such traverse is filed, an issue is joined which shall be tried before a jury. Rules against officers of the court for breaches of duty are sui generis, and are governed more largely by the discretion of the court in each particular case than by the technical rules of ordinary procedure. Hixon v. Callaway, 2 Ga. App. 678 (S.E.). While there is no express statutory provisions for motions in the nature of general demurrers to strike and dismiss the respondent's answer; nevertheless, such motion may be made. Wilkins v. Jordan, 50 Ga. App. 119 (S.E.); Reynolds v. Howard, 113 Ga. 349 (3) (S.E.); Read Phosphate Co. v. Weichselbaum Co., 1 Ga. App. 420 (1), (S.E.).

The trial court sustained several grounds of the motion to dismiss, one of them being that the answer was vague, indefinite, uncertain, evasive and self-contradictory. Exceptions pendente lite were taken to this portion of the order; however, nowhere in the bill of exceptions is error assigned either on the exceptions pendente lite or on the order of the court sustaining these grounds of the motion. Code Section 24-210 provides in part as follows: "The officer called on by rule nisi, as provided in the preceding section, shall *fully respond* in writing to said rule, which answer shall be under oath taken at the time the answer is filed; and if the answer is not denied, the rule shall be

discharged, *or made absolute, according as the court may deem the answer sufficient or not.*" Italics ours.

The discretion of the trial court to hold that an answer is evasive and insufficient for this reason is recognized in Willis v. Powell, 51 Ga. 476 (S.E.) wherein it is held as follows: "The court may have deemed the answer of the sheriff evasive and insufficient and for that reason made the rule absolute. We find nothing in this record that will authorize this court to control the discretion of the court below in making the rule absolute and ordering an attachment to issue against the sheriff." See also Wilkins v. Jordan, supra. It may be seen that not only does the very language of the code section itself authorize the court to examine the answer and determine if the respondent has full responded, but this authority has been recognized by our appellate courts. It follows therefore that the trial court can find answers to be vague, indefinite and evasive, which answers at the same time contain issuable facts and which answers at the same time, should the trial court exercise his discretion by not striking the same for vagueness or evasiveness, could show reasons why the rule absolute should not be issued. Here the trial court found the answer to contain issues of fact. He also found that the answer contained reasons why the rule should not be made absolute, yet he found the answer subject to be stricken for evasiveness if not amended in this respect. The answer was not amended in this respect and the order finding it subject thereto is not excepted to in the bill of exceptions. Accordingly, the question of whether the trial court abused his discretion in striking the answer for evasiveness is not before this court. It became the law of the case that it was evasive, even though as a matter of fact it may not have been.

Assignments of error must be made in the bill of exceptions in order to present any question for decision. Code Section 6-901; Parker v. Harling, 187 Ga. 419 (1) (S.E.); Jett v. Wolfe, 7 Ga. App. 155 (3), (S.E.). It accordingly became the law of the case that the answer as amended (the motion having been renewed after an amendment thereto by respondent) was subject to the defects

therein stated, and whether or not it may have been so subject in point of fact is a question not presented to this court for decision. The trial court is vested with large discretion in such cases (Read Phosphate Co. v. Weichselbaum Co., supra) and where, the answer being thus evasive, and the proceeding requiring, under Code Section 24-210 that he "fully respond," upon his failure to do so the discretion of the trial court in making the rule absolute will not be interfered with. Wilkins v. Jordan, 50 Ga. App. 119, 121, (S.E.); Albert v. Howell, 32 Ga. 548 (S.E.); Willis v. Powell, 51 Ga. 475 (S.E.).

The trial court did not err in his orders of November 17 in striking the respondent's answer and thereafter entering a rule absolute against him.

2. It is further contended that the orders of November 17 are void because the judge sitting at the hearing did not have jurisdiction of the case. The bill of exceptions and exceptions pendente lite disclose that the hearing was before Hon. E. E. Andrews, who is a judge of the Superior Court of Fulton County, and we are cited to no rule of court under which it would be unlawful for him, rather than another superior court judge of the Atlanta circuit, to preside over the case. This exception is without merit.

3. It is contended that the trial court committed reversible error when, on November 8, 1950, he refused to grant a motion for a continuance on behalf of the respondent for a 30 day period, on the ground that leading counsel and associate counsel were engaged in the trial of other cases. The court did grant a continuance for nine days, and no further motion was urged at that time for a further continuance. It does not therefore appear that the respondent was harmed, since he was granted a continuance and failed to show, at the expiration of the period of time granted, that he could not safely go to trial. This objection is without merit.

4. Exceptions pendente lite were preserved to the overruling of respondent's special demurrers to the original motion of movant, to the first amendment thereto, to the second amendment thereto, and to the third amendment thereto and the motion as amended. As to the first and second amendments, these were subsequently stricken by

the movant and have no proper place in the record; accordingly, questions regarding their sufficiency are moot. See Aiken v. Richardson, 80 Ga. App. 591 (S.E.). This case also held that the motion as finally amended was not subject to general demurrer. Accordingly, any error in regard to special demurrers thereto is harmless to the defendant under the circumstances of this case, since, after the order striking his answer, *as finally amended*, he presented no defense whatever and a judgment making the rule absolute was demanded. These exceptions are without merit.

5. Error is also assigned on the judgment of the court admitting an affidavit that a letter making demand for the sum involved had been delivered to the respondent, together with a copy of the letter referred to. Code Section 24-207 provides as follows: "A copy of said demand produced in court, verified by affidavit, stating when and where the original was served upon the officer shall be prima facie evidence of the date and service thereof." Accordingly, it was not error to receive the affidavit stating the contents of the demand and when and where the original was delivered to the officer.

6. Error is also assigned on various rulings of the court in permitting the traverse to the response, which originally contained a defective verification, to be amended, and in failing to strike the traverse. Where the respondent's answer is so defective as to authorize the court to make the rule absolute, whether or not a traverse is made is immaterial, "since it is only a verified answer, and one that 'shall fully respond . . . to said rule (nisi)' without being vague, uncertain, indefinite, or evasive, which the statute requires to be traversed . . ." Wilkins v. Jordan, supra, at page 121. The question regarding the sufficiency of the traverse are therefore nugatory.

Judgment affirmed on the main bill of exceptions. Cross bill dismissed. Gardner, *J.*, concurs in judgment. Townsend, *J.*, concurs specially.

Townsend, *J.* (Concurring specially):

Although the professional integrity of the respondent is not in issue in this case, nevertheless attacks have been

levied against him both in the pleadings of the movant and in briefs of movant's counsel.

The respondent lost his case because he failed to except to the order of the trial judge of October 23 in which his answer was held to be evasive. It is the personal opinion of the writer that had this question been a subject of review it would have been the duty of this court to find that the trial court abused his discretion in holding the answer so evasive as to require its dismissal. Since that question was not presented, it became the law of the case that it "*is*" so evasive. However, had the respondent been permitted to have the issue decided by a jury and had the jury found in accordance with the contentions of respondent, there could certainly be no reflection upon the professional integrity of the movant. On the other hand, had the jury found against his contentions, it would not necessarily follow that the contentions were made in bad faith. Therefore, in justice to the respondent, the writer desires to make it clear that although he concurs in this opinion as written, he does not consider as warranted the attack made on the character of the respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 795 81

G. SEALS AIKEN,

Appellant,

vs.

WILLIAM RICHARDSON

APPEAL FROM THE COURT OF APPEALS OF GEORGIA

APPELLEE'S STATEMENT OPPOSING JURISDICTION

RALPH WILLIAMS,
Counsel for Appellee.

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UNITED STATES SUPREME COURT

OCTOBER TERM, 1951

No. 795

G. SEALS AIKEN,

Appellant

vs.

WILLIAM RICHARDSON,

Appellee

APPEAL FROM COURT OF APPEALS OF GEORGIA

APPELLEE'S STATEMENT OPPOSING JURISDICTION

The Appellee Richardson filed in Fulton Superior Court a motion for a money rule to require his attorney, Mr. Aiken, to pay over to him his part of money collected by Mr. Aiken because of an automobile accident. The motion, as amended, alleged that Mr. Aiken had collected Three Thousand, Four Hundred Twenty-five and No/100 Dollars ($3,425.00); that he was entitled to retain out of the recovery one-third thereof as attorney's fees and certain incidental expenses; that the balance due his client amounted

to Two Thousand, One Hundred Eighty-nine and 38/100 Dollars ($2,189.38); that Mr. Aiken had tendered a check for One Thousand, Five Hundred Ninety-one and 33/100 Dollars ($1,591.33) marked "in full payment" which had been returned to him; and that Mr. Aiken on demand refused to pay to his client what was due him out of the sum recovered. The motion prayed for an order requiring Mr. Aiken to pay his client Two Thousand, One Hundred Eighty-nine and 38/100 Dollars ($2,189.38).

The Georgia statute, here assailed, requires an attorney in such a case to respond "fully". Mr. Aiken filed a response of great length, in which he did not deny that he held the entire recovery, but in which he failed to set out whether the client was entitled to any portion of the recovery, and if so to what amount the client was entitled. Accordingly, the client moved to strike Mr. Aiken's response upon the ground that it was evasive and insufficient in law. The Trial Court sustained this motion with leave to amend. Mr. Aiken declined to amend and the Court, therefore, struck his answer. Thereafter the Court entered a rule absolute ordering Mr. Aiken:

> "To pay over to William Richardson or his attorneys of record the sum of Two Thousand, One Hundred Eighty-nine and 38/100 Dollars ($2,189.38)"

together with interest applicable in such cases.

(At no time did Mr. Aiken offer to show that he had actually paid to the client any sum whatsoever, but Mr. Aiken stated only that he had conditionally tendered a check for One Thousand, Five Hundred Ninety-one and 33/100 Dollars ($1,591.33), which was admittedly returned. The statement of Mr. Aiken in his Statement as to Jurisdiction that he had "paid" the client One Thousand, Five Hundred Ninety-one and 33/100 Dollars ($1,591.33) is without any basis in fact.)

Thus, the only judgment rendered in the State court was one requiring that Mr. Aiken pay over to his client that part of the recovery which belonged to his client. The Court did not decide whether Mr. Aiken had committed any wrong except only the wrongful withholding of his client's money. No other question was before the Court for decision.

There is, therefore, not the slightest basis for the assertion in Mr. Aiken's Statement as to Jurisdiction that the statute "as thus construed and given effect, adjudged him guilty or presumptively guilty of the unproven crimes", or that it "creates a presumption that is arbitrary and operates to deny Appellant a fair opportunity to repel".

The most that Mr. Aiken can contend is that the Georgia statute, here assailed, placed upon him as an attorney, when called upon by the Court for an explanation with respect to his client's money in Mr. Aiken's hands, the duty of responding "fully", but such duty rests upon an attorney at common law (7 C. J. S., Section 133, page 973), and hence the Georgia statute in so requiring does not deny due process.

As a matter of fact, however, the decision from which this appeal is taken is based on the fact that Mr. Aiken did not except to the order which sustained, with leave to amend, the motion to strike his answer as evasive. This judgment became the law of the case and, when Mr. Aiken declined to amend his answer within the time allowed and account for moneys admittedly received for his client, the Court had no option but to strike his answer and enter a rule absolute against him.

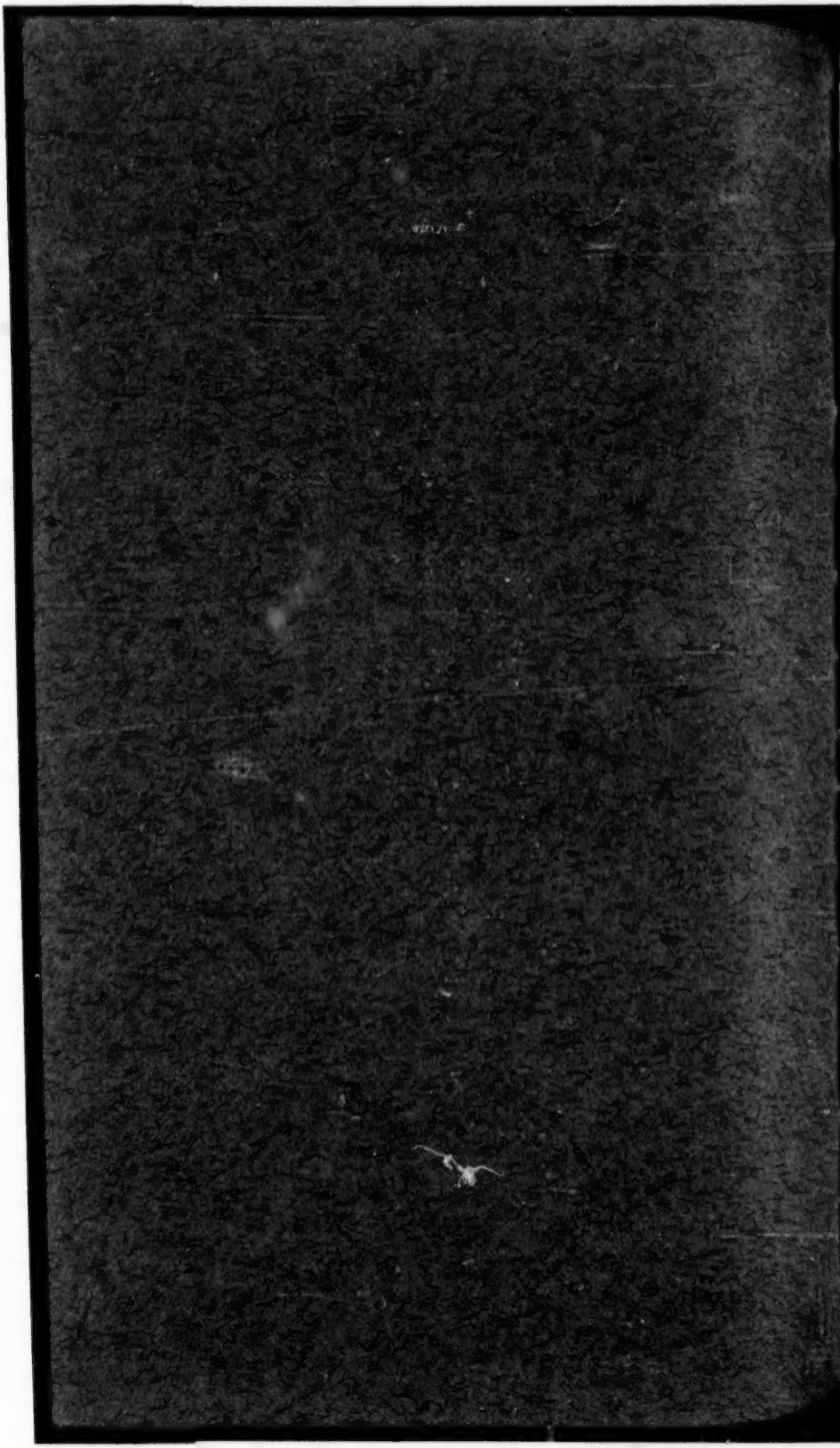
The decision, therefore, involved nothing more than the application in this case of settled Georgia Practice Rules. In *Aiken* v. *Richardson*, 207 Ga. 735, 64 S. E. (2d) 54, the Supreme Court of Georgia has already held that no con-

stitutional questions had been raised in the Trial Court, or were before the Court for adjudication, and this appeal does not involve any constitutional question or substantial Federal question.

Respectfully submitted,

RALPH WILLIAMS,
Attorney for Appellee.

(2227)



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UNITED STATES SUPREME COURT

OCTOBER TERM, 1951

No. 795

G. SEALS AIKEN,

Appellant

vs.

WILLIAM RICHARDSON,

Appellee

APPEAL FROM COURT OF APPEALS OF GEORGIA

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

So much of Appellee's Statement which attempts to convey the impression that Appellant's answer failed to raise issues of fact is incorrect and misleading. As a matter of fact, Appellant's answer unmistakably alleged that under the terms of the final contract for the settlement of the case and the division of the proceeds thereof, Appellee agreed to accept $1,591.33 in full payment of the amount due him out of said settlement, and that this amount was sent to him by check dated May 20, 1949, immediately upon collection, in conformity with said agreement (R. 101-5, 78, 86-7). This allegation was corroborated by the express admission of Appellee in his deposition that at the time he had turned over the releases to Appellant he inquired, "Now what are we (referring to himself and wife) going

to get out of this?"; that he was told by Appellant that he would get "around $1,600.00" and that his "wife would get two-thirds of $800.00"; and that he then left said executed releases with Appellant. These facts were specially alleged in Appellant's amended answer (R. 104-5).

The irony of this litigation is that notwithstanding the said allegations predicated upon Appellee's own testimony, Appellant has been deprived of his right to avail himself of the use of said deposition upon a trial of the issues of fact. The denial of this right presents for consideration the same constitutional and federal questions involved in the case of *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, which holds: "1. . . . it is a denial of due process of law to strike out an answer, and render a decree pro confesso as a punishment for contempt."

The record shows Appellee returned the check for $1,591.33 sent to him by Appellant, with the demand that Appellant pay him $2,283.33 (which was $692.00 more than the amount due Appellee under the settlement agreement), and with threat of a penalty of twenty per cent per annum thereon, and a penal money rule, contempt, and disbarment proceeding if he did not comply with said demand. Upon Appellant's refusal to submit to said arbitrary and lawless demand, Appellee carried out his threat by filing with the Superior Court a motion for said penal proceeding against Appellant, and charged him, as the basis therefor, with a number of serious criminal offenses set forth therein. The Superior Court thereupon issued a penal rule against Appellant, struck his answer denying the charges, and rendered a rule absolute against him for $2,189.38 with 20 per cent penalty per annum thereon from May 23, 1949, until paid, without any evidence and without a trial, in violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution. *In Re Oliver*, 333

U. S. 257; *Hovey* v. *Elliott*, 167 U. S. 409; *In Re Long*, 40 N. E. 2nd 247.

It is a well recognized principle that in a penal money rule proceeding against an attorney or officer of the court, the amount sought must be definite, stated, and certain, and not a mere controversy over the proper amount of fees and expenses deductible from the collection or over disputed rights and credits, so as to require a remand of petitioner to his ordinary remedies at law for determination. *Texas* v. *White*, 10 Wall. 483; *Felton* v. *Smith et al.*, 52 Ga. App. 436, 183 S. E. 634.

Appellee states that in the case of *Aiken* v. *Richardson*, 207 Ga. 735, 64 S. E. 2nd 54, the Supreme Court of Georgia held that no constitutional questions had been raised in the trial court. The record, however, shows error was assigned on federal constitutional grounds by exceptions pendente lite and by direct bill of exceptions (R. 7-11, 13-14, 32-3, 39-41). It also appears that the Supreme Court of Georgia in said decision transferred the case to the Court of Appeals of Georgia with an opinion that no constitutional questions were presented. This Court held in *Lovell* v. *City of Griffin*, 303 U. S. 444, that the attack therein made on a city ordinance on the ground it violated a designated provision in the Federal Constitution adequately presented a federal question and that *whether it was so presented and was decided is itself a federal question.*

Respectfully submitted,

G. Seals Aiken,
Ben F. Sweet,
F. L. Breen,
Attorneys for Appellant.

Service acknowledged this 9th day of May, 1952.

Ralph Williams,
per ————.